

21 February 2012

The General Manager  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [GSTadministration@treasury.gov.au](mailto:GSTadministration@treasury.gov.au)

Dear Sir/Madam

**Exposure draft - Commissioner's ability to retain refunds pending verification checks**

BDO welcomes the opportunity to provide submissions on the matters raised in the Exposure Draft of legislation which, *inter alia*, provides for the insertion of proposed new s8AAZLGA into the *Taxation Administration Act 1953* and accompanying Exposure Draft Explanatory Memorandum released for public consultation on 15 February 2012.

Our submissions are attached as an Appendix.

Should you have any questions, or wish to discuss any of the comments made in the submissions, please do not hesitate to contact me on (02) 9286 5527.

Yours sincerely,



Matthew Wallace  
National Tax Counsel  
Corporate & International

## APPENDIX - SUBMISSIONS

This document sets out the submissions of BDO in relation to the exposure draft (Exposure Draft) of proposed legislation for, *inter alia*, the insertion new s8AAZLGA into the *Taxation Administration Act 1953* (TAA) and accompanying exposure draft explanatory memorandum (EM) released by Treasury for public consultation on 15 February 2012.

Statutory references are to the provisions of the TAA, unless otherwise indicated.

### 1. Unsatisfactory time allowed for submissions

The changes proposed:

- Have substantial breadth of operation and potential impact
- Can result in the imposition of unnecessary and unjustified financial hardship on taxpayers
- Contradict the underlying philosophy of the self assessment system
- Are arguably unnecessary where the Commissioner already has material powers of assessment and enquiry.

In light of this, the provision of less than one week for the making of submissions in respect of the proposed amendments is unsatisfactory. This must, of necessity, result in hurriedly prepared submissions without the benefit of due consideration or consultation.

### 2. Context

There is little meaningful attempt within the EM to explore the legal context of the proposed amendments. Accordingly we have attempted to briefly note salient parts of that context which, in turn, informs the remainder of our submissions.

#### 2.1. Amendments not confined in their operation to GST

Even though the decision cited in the EM as justification for the proposed changes (*C of T v Multiflex Pty Ltd* [2011] FCAFC 142) addressed a refund in respect of the Goods and Services Tax (GST) and the discussion in the EM under the heading *Context of Amendments* focuses virtually exclusively on administration of the GST, the proposed amendment will have much wider operation. It will apply in respect of refunds referable to any tax credit in a taxpayer's favour (see s8AAZLF(1)). Thus, the change will extend to amounts in respect of, amongst other things, income tax, fringe benefits tax and withholding tax. The case for such broad operation of the proposed measures has not been made.

#### 2.2. Self assessment system and asymmetry of proposed treatment

Under the self assessment systems, adopted in respect of each of the taxes which are the subject of s8AAZLF (and proposed s8AAZLGA), the primary obligation in respect of the ascertainment of a taxpayer's tax liability, is placed on the taxpayer. Thus the return by a taxpayer of a positive amount results in a liability to tax.

Once an assessment has been made, a present liability to tax exists notwithstanding any bona fide concern that a taxpayer may have with such assessment or any dispute that a taxpayer may wish to prosecute in respect of such assessment. Thus, where, for example, a taxpayer

commences objection and appeal processes under Part IVC, there is no obstacle to the Commissioner recovering the full amount of the disputed tax.

The adoption of proposed s8AAZLGA is contradictory to both the operation and policy of such self assessment regimes. The provision introduces a selective return of assessment power to the Commissioner. In doing so, it allows discriminatory treatment of different taxpayers and provides for inconsistent treatment of the legitimate concerns of a taxpayer in respect of a tax obligation, on the one hand, and those of the Commissioner in respect of a refund entitlement, on the other. More importantly, the exercise of the power results in a denial, to the taxpayer, of money to which that taxpayer is entitled and may be reliant upon.

### 2.3. Commissioner's power of assessment

As was pointed out by the Full Federal Court in the *Multiflex* case, the Commissioner already has an ample remedy available to him where he knows the basis for a refund claim is incorrect - his power of assessment. Thus at paragraph 26 of the judgment in that case, the Court observed:

*"The answer which the legislation provides to the Commissioner's disquiet as to being obliged to make a refund based on a claimed net amount in a business activity statement which he knows to be wrong is straightforward. In such circumstances, he is entitled at any time to make an assessment of that net amount: s105-5 of Sch 1 to the TAA"* (emphasis added)

There are corresponding powers of assessment in respect of the other taxes which are the subject of the proposed new power.

### 2.4. Commissioner's powers of enquiry

The Commissioner's powers of assessment are bolstered by quite material information gathering powers such as:

- ss263 and 264 *Income Tax Assessment Act 1936*
- s127 *Fringe Benefits Tax Assessment Act 1986*
- ss 13F and 353-15 of Schedule 1

The combination of assessment and information gathering powers already equip the Commissioner to deal with many circumstances where he may have reservations about paying a refund.

### 2.5. Potential financial embarrassment of businesses due to impact on cash-flow

Businesses can, potentially, be dependent upon the receipt of refunds for their continuation and financial well being. Thus, for example, businesses that have a focus on the provision of GST free supplies (such as exports or many pharmaceuticals) would expect, and financially rely upon, the regular receipt of refunds. The potential material delay of such refunds based on a decision by the Commissioner that it "would be reasonable to require verification of information" could provide unnecessary financial embarrassment to such businesses and, in extreme circumstances, challenge their continued financial viability.

Again, it should be noted, that this can arise without any evidence of wrongdoing on the part of the taxpayer.

### **3. Higher standard should be imposed on the Commissioner on initial exercise of power**

In light of the context of the proposed amendment, described above, the standard imposed on the Commissioner, that:

“the Commissioner is satisfied that it would be reasonable to require verification”,

does not impose a sufficiently high barrier to what is a material departure from self assessment principles. To this end we would submit that the Commissioner should be compelled to have regard to the factors specified in proposed s8AAZLGA(8) in making the initial decision to retain the amount of a refund.

We would further submit that proposed s8AAZLGA(8)(f) should be omitted and the following substituted in its place:

- “(f) *the underlying policy of the self assessment taxation system;*
- (g) *whether it would be more appropriate in the circumstances to issue an assessment (including an amended assessment) to the taxpayer in respect of the amount claimed as a refund; and*
- (h) *any other matter that is materially relevant”.*

A further concern is the potential for the initial 60 day period, under proposed s8AAZLGA(3), to be substantially extended by means of a series of, potentially onerous to comply with, information requests under s8AAZLGA(4). To this end, an absolute maximum of, say, 90 days should be imposed before the Commissioner is compelled to bring action to be able to continue to retain the amount (discussed below).

### **4. Onus should be placed on Commissioner to justify retention beyond prescribed maximum retention period**

Where the maximum time period, discussed above, has been reached, the onus should not be placed on the taxpayer to object and then appeal, if unsuccessful, against the objection decision. As it would be the Commissioner frustrating the legitimate expectations of the taxpayer under the self assessment system, it should be the Commissioner seeking authority to continue to do so. Accordingly, if the Commissioner wishes to continue to retain the amount of the refund without issuing an assessment, the Commissioner should be required to bring an action before the Administrative Appeals Tribunal seeking authority to continue to withhold the refund. In bringing that action, there would be an onus on the Commissioner to establish that having regard to the factors specified in proposed s8AAZLGA(8)(modified, as discussed above) it would be reasonable for the Commissioner to continue to retain the taxpayer’s refund.

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